BORNEO HOUSING MORTGAGE FINANCE BHD.

v.

BANK BUMIPUTRA (M) BHD. & ANOR.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[ORIGINATING SUMMONS NOS. 150, 151 & 152 OF 1988]
12 NOVEMBER 1990

LAND LAW: *Prohibitory orders - Setting aside - Native lands - Conversion and subdivision into country leases - Owned by Chairman of company as trustee of the company - Undertaking to transfer subdivided land title deeds to prospective purchasers - Beneficial interest - When interest vests in purchaser - Equitable chargees and assignees of purchasers - Memoranda of transfers in escrow executed - Validity of trust relationship between registered owner and company - Whether void and unenforceable for illegality - Sabah Land Ordinance (Cap 68) (Sabah), ss. 17(1), 88, 95.*

On 25 February 1981, a private limited company PD, whose chairman and shareholder was one D, had requested end financing facilities from the plaintiff P for a shophouse project involving the development of 2 pieces of native lands (the said lands) which were being converted and subdivided into country leases. PD informed P that the said lands were registered in D's name as trustee for PD and that upon conversion and subdivision, the land titles would be transferred to PD after which PD undertook to transfer the subdivided titles to individual purchasers.

P approved PD's application and provided end financing for 29 purchasers. The relevant subdivided title deeds were issued to D whereby PD arranged for D to directly transfer the land titles to the respective purchasers of the project; the title deeds were released to the purchasers' solicitors. D then executed the relevant memoranda of transfer to the purchasers who had paid the full purchase price who were subsequently given possession of the relevant land titles.

Out of the 29 subdivided land titles, 22 had been transferred to and registered in the name of the relevant purchasers and charged to and registered in P's name as chargees. The defendants who were the judgment creditors of D, obtained prohibitory orders against the remaining 7 pieces of landed properties for seizure and sale. P then applied to set aside these prohibitory orders, arguing that D has no more beneficial interest in these lands for the defendants to seize and sell and that they, P, are the equitable chargees and assignees of the purchasers for the beneficial interest in these 7 landed properties as against the defendants and D.

The defendants contended that the declared trust relationship between D and PD was in breach of s. 17(1) of the Land Ordinance (the Ordinance) (which expressly forbids all dealings in land between non-native and native unless entered into prior to 16 January 1883 or if it falls within certain exception in Clauses (2), (3) or (4)) and that therefore it was void and unenforceable; it was also submitted that the sale and purchase agreements entered into between PD and the purchasers are tainted with illegality as the status of the lands, at the time the agreements were entered into, was still native and that therefore it was in breach of s. 17(1) of the Ordinance.

P argued that as they claim beneficial interest over lands held under country leases, s. 17 is inapplicable as it would revive the original 2 native titles which had been legally extinguished.

Held:

[1] There was nothing illegal in D and PD being issued with subdivided country leases by the government authority to replace the 2 original native titles. A registered owner by executing a memoranda of transfer, or payment of the purchase price in full, divests himself of all beneficial interest in the land and vests it in the *bona fide* purchaser - the registered owner becomes a bare trustee. The defendants' contention that the trust relationship between D and PD was void and unenforceable is not substantiated.

[2] Upon reading Clause 1 of the sale and purchase agreements, the Court held that these agreements were made with a view to sale after the issue of the subdivisional title - therefore these agreements were not contrary to the provisions of the Ordinance.

[P's application granted.]

Cases referred to:

Ng Boo Bee v. Khaw Joo Choe & Ors. [1916] 14 SSLR 90
Karuppiah Chettiar v. Subramaniam [1917] 2 MLJ 116
Temenggong Securities Ltd. v. Registrar of Titles [1974] 2 MLJ 45
Ng Kheng Yeow v. Chiah Ah Foo & Ors. [1987] CLJ (Rep) 254
Firth Concrete Industries Ltd. v. Duncan [1973] 1 NZLR 188
Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd. [1990] 1 CLJ (Rep) 49
Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] 1 MLJ 224
Manang Lim Native Sdn. Bhd. v. Manang Selaman [1986] 1 MLJ 379
Foh Say Lee v. Ooi Heng Wah [1969] 1 MLJ 47
Sajan Singh v. Sardara Ali [1960] 1 All ER 269
Crowly v. Bergtheil [1899] AC 374
UMBC v. Goh Tuan Laye & Ors. [1976] 1 MLJ 169

Legislation referred to:

Land Ordinance (Cap 68) (Sabah), ss. 4, 17(1), 64, 88, 95
Land Ordinance (Cap 81) (Sarawak), s. 8

Other sources referred to:

Chitty on Contracts 25th Edn., Vol. 1, para. 1169, p. 633
Halsbury's Laws of England, 4th Edn., Vol. 9., pp. 433, 434
Land Law in Malaysia Cases and Commentary p. 170 by Teo Keang Sood and Khaw Lake Tee
Sale and Purchase of Real Property in Malaysia p. 218 by Visu Sinnadurai
The National Land Code [1981] Chap. 14, pp. 333-334 by Judith E.Sihombing

For the Plaintiffs - Chong Kah Kiat; M/s. Shelley Yap Leong Tseu Chong Chia & Co.
For the Defendants in OS. 151 and OS. 152 - Vincent Fernandez; M/s. Fernandez & Co.
For the Defendants in OS. 150 - Philip Lee; M/s. Malanjum Lee, Aziz & Co.

[**Editor's Note:** The following case was heard together at this High Court sitting: *Borneo Housing Mortgage Finance Bhd. v. Malaysia Credit Finance Bhd.* (O.S. No. 151 & 152 of 1988)]

JUDGMENT

Syed Ahmad Idid JC:

This is an application by plaintiffs in OS Nos. 150, 151 and 152 of 1988 for an order that the prohibitory orders including any renewals thereof obtained by the defendants against the seven (7) pieces of lands held under Keningau Country Leases Nos. 135319667, 135319836,

135319845, 135319890, 135319916, 135320026 and 135320099 and registered against the said titles in the Central Land Registry and any order for the sale of the said lands be set aside on the ground that Dunstan Dumpangol the present registered owner of the said lands has no more beneficial interest therein for the defendant to seize and sell.

The Court had on 18 January 1989 ordered that Originating Summons No. 150 of 1988 be consolidated with OS No. 151 of 1988 and OS No. 152 of 1988 as the three applications are of the same subject matter giving rise to common questions of law and fact.

The plaintiffs' applications are to set aside the prohibitory orders obtained by both the defendants against, *inter alia*, the seven pieces of landed properties under country leases on the ground that the registered owner one Dunstan Dumpangol had no more beneficial interest therein for the defendants to seize and sell.

The plaintiffs' claim are as the equitable chargees and assignees of the purchasers for the beneficial interest in the 7 pieces of landed properties as against both the defendants' claim as the judgment creditors of the registered owner.

Facts

There were 2 original pieces of lands under native titles 1331031544 and 133031553 registered in the name of Dunstan Dumpangol.

A private limited company called Pegalan Development Sdn. Bhd. was established in December 1979 with Dunstan Dumpangol as the chairman and a shareholder.

The plaintiffs had on 25 February 1981 received an application from one Pegalan Development Sdn. Bhd. (hereinafter called "the company") *vide* letter dated 23 February 1981 to request for end financing facility to their shophousing project in Keningau (hereinafter called "the project") which project comprised of 67 units of two-storey shophouses. The project involved the development of two (2) pieces of native lands then under conversion and subdivision into country leases.

The aforesaid company in their application to the plaintiffs for end financing facility had represented that the two (2) pieces of native lands were registered in the name of their Chairman Dunstan Dumpangol as trustee of the company and that upon conversion and subdivision into country leases the subdivided land titles would be transferred to the company. Thereafter the company would undertake to transfer the subdivided titles to individual purchasers.

The company had on 2 April 1981 informed the plaintiffs that the Director of Lands & Surveys had approved the conversion and subdivision of the two (2) pieces of native lands into subdivided country leases under letter of approval dated 15 March 1981.

The plaintiffs had accordingly on 21 September 1981 approved the company's application to provide end finance up to 35 applications by individual purchasers in respect of the project. The plaintiffs eventually approved end finance to purchasers of 29 units of shophouses including purchasers of the seven affected landed properties.

The plaintiffs had thereupon entered into the relevant loan agreement cum assignment documentation with all the 29 successful applicants/purchasers including the purchasers for the seven affected landed properties.

Pending the issuance of the subdivided land titles under country leases and having received from the respective purchasers and then from the plaintiffs progressive payments out of the approved loan monies the company had executed the relevant memoranda of transfer in

escrow in respect of the subdivided land titles in favour of the 29 purchasers. The said purchasers had simultaneously executed the memoranda of charge in escrow in favour of the plaintiffs.

The relevant subdivided land title deeds under country leases were eventually issued by the Director of Lands & surveys in November 1983 to the registered owner Dunstan Dumpangol.

As the project was then already completed when the subdivided land title deeds under country leases were issued the company decided not to incur additional costs in undertaking the exercise of transferring the subdivided land titles to its name. Instead, it arranged for direct transfer from the registered owner Dunstan Dumpangol to the respective purchasers of the project. The plaintiffs had no reason to object in view of the fact that the registered owner Dunstan Dumpangol was also the Chairman and shareholder of the company. The company has also provided the plaintiffs a copy of letter dated 12 February 1982 signed by the said Dunstan Dumpangol declaring and holding himself as trustee of the company. The company had also shown to the plaintiffs that it had paid for all the conversion and subdivision premium to the state authority *vide* letter dated 15 November 1982.

More importantly, the registered owner Dunstan Dumpangol had in 1984, after the project was completed, executed fresh memoranda of transfer in escrow in favour of the purchasers in respect of the project including all the 29 purchasers provided with end finance facility by the plaintiffs.

All the 29 subdivided land title deeds under country leases had been released by the company and/or the registered owner Dunstan Dumpangol to the purchasers' solicitors Messrs. Lee & Thong who are also the solicitors for the plaintiffs on 29 November 1983 to effect the necessary transfers and charges as the full purchase price had been settled. Out of the 29 subdivided land titles, 22 had been duly transferred to and registered in the names of the relevant purchasers and duly charged to and registered in the name of the plaintiffs as the chargees. The remaining 7 land title deeds are the 7 affected landed properties which have been held back due to the prohibitory orders the subject of this application.

The Issues

(1) Whether the declared trust relationship between the registered owner and the company is in breach of s. 17(1) of the Sabah Land Ordinance and therefore void and unenforceable for the illegality.

(2) Whether the sale and purchase agreements entered between the company and the purchasers are tainted with illegality being in breach of s. 17(1) of the Sabah Land Ordinance.

(3) Whether the plaintiffs as their assignors (the 7 affected purchasers by not registering their interest, transfers and charges or lodging any caveat) have thereby lost their priority to the defendants' prohibitory orders.

(4) If the trust is valid whether the registered owner had thereby divested his beneficial interest in the said lands notwithstanding the fact that the defendants' prohibitory orders were registered on 21 May 1986 prior to the plaintiffs' caveats.

(5) Whether the claim by the registered owner that he held the landed properties in trust was an attempt to defeat the defendants' claim under the judgments obtained.

(6) Notwithstanding the above issues, whether the fact that the registered owner by releasing the relevant land title deeds under country leases to the plaintiffs and by executing the relevant memoranda of transfers in escrow in favour of the 7 affected purchasers had thereby divested his beneficial interest thereof in favour of the purchasers and the plaintiffs.

Contentions

On issue (1):

Plaintiffs submit that as they claim beneficial interest over lands held under country leases s. 17 of the Sabah Land Ordinance should not apply. Plaintiffs are of the view that the defendants in raising s. 17 are in effect reviving the original 2 native titles which had been legally extinguished (when the country lease titles were issued on 25 June 1981 for a period from 1 January 1981 to 31 December 2079).

But defendants say that s. 17(1) of the Land Ordinance provided *inter alia* that all dealings in land between non-native and native are expressly forbidden and no such dealing shall be valid and shall be recognised in any Court of law unless such dealing shall have been entered into or concluded before 16 January 1883 or falls within the ambit of sub-clauses (2), (3) and (4) thereof. Section 64, Part IV of the Land Ordinance provides that in the case of land held by natives no non-native shall purchase such land unless in accordance with the terms of s. 17, or acquire any interest therein by way of charge or otherwise.

To the defendants, it is clear that s. 17 of the said Ordinance prohibits all dealings in land between natives and non-natives unless they have been entered into and concluded before 16 January 1883 or in the terms of subsections 2, 3 and 4 thereof. By s. 4 of the said Ordinance, dealings is defined as any transaction of whatever nature by which land is affected under this Ordinance.

I find that there was nothing illegal when the registered owner (and the company Pegalan Development Sdn. Bhd.) were issued with subdivided country leases by the Government Authority to replace the 2 original native titles. Indeed it had been made very clear that the plaintiffs' claim was for the beneficial interest in those land titles held under country leases. The cases of *Ng Boo Bee v. Khaw Joo Choe & Ors.* [1916] 14 SSLR 90, *Karuppiah Chettiar v. Subramaniam* [1917] 2 MLJ 116, *Temenggong Securities Ltd. v. Registrar of Titles* [1974] 2 MLJ 45, *Ng Kheng Yeow v. Chiah Ah Foo & Ors.* [1987] CLJ (Rep) 254, *Firth Concrete Industries Ltd. v. Duncan* [1973] 1 NZLR 188 and *Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd.* [1990] 1 CLJ (Rep) 49 are clear authorities for the proposition that a registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the *bona fide* purchaser. The registered owner in effect becomes bare trustee.

In *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 CA where Gill FJ at p. 229 B said:

> In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser.

And further down at p. 229 H Gill FJ added that:

> Where the purchase money had been paid and the purchaser has received the instrument of transfer and the title deeds from the vendor but omits to complete registration, if the vendor comes to set aside the sale, it would be a good answer to say that he has no interest in the land because he cannot retain the estate for a moment against the purchaser.

I must, here, deal with s. 17(1) which states:

> Except with the written permission of the Minister, all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any Court of law unless they shall have been entered into and concluded before 16 January 1883, or in the terms of the next following clause.

Both the defendants Bank Bumiputra Malaysia Berhad and Malaysia Credit Finance Berhad in their respective affidavits contended that the purported trust relationship between the registered owner and the company Pegalan Development Sdn. Bhd., was in breach of s. 17(1) and therefore void and unenforceable.

What is a dealing? We can see the full import of this word in ss. 88 and 95 of the Sabah Land Ordinance, for example "no ... dealing with ... shall be valid until it has been registered." Judith E. Sihombing in her text "*The National Land Code (1981)*" in Chapter 14 at pp. 333-334 has this to say of the term "dealing":

> The term 'dealing' refers to a transaction in land entered into in accordance with the provisions of the code which, when completed and an instrument in statutory form is registered, gives rise to a substantive entry on the register appropriate to the transaction.
>
> The dealing is:
>
> (b) not a transaction involving the creation of a beneficial interest in land under a trust; the trust is created under the principles of trust law;

Law is no befuddled field; the Court should not be plunged in mire where there is only darkness and inactivity. We have to see a way to solve the problem and there is a problem as otherwise there would not be this case here. I intend to look at the questions and issues from the practical perspective. I am of the opinion that all laws should be designed to facilitate and help people rather than put brakes to progress. Here we have an old law while the State of Sabah is developing. If I rule, as defendants wish, that the trust relationship between the legal owner and the company is illegal and in breach of s. 17(1) of the Sabah Land Ordinance, where do the 7 pieces of landed property go? They are no longer "native" as declared by the land authorities and the State Government. The contention of Bank Bumiputra Malaysia Berhad and the Malaysia Credit Finance Berhad that the trust relationship between the registered owner and the company Pegalan was void and unenforceable is not substantiated. In fact, the registered owner had executed the relevant memorandum of transfers in statutory form in favour of the affected purchasers who had paid the full purchase price and were given possession of the relevant land titles.

On Issue (2):

The defendants submit that the company was not competent to enter into the sale and purchase agreements with the purchasers of the 7 affected properties because (i) at the material times when the agreements were entered into, the status of the lands was "native". *Manang Lim Native Sdn. Bhd. v. Manang Selaman* [1986] 1 MLJ 379 was cited in support. Though that case settled the point on s. 8 of the Sarawak Land Code (similar in substance to s. 17(1) of the Sabah Land Ordinance) in that although it is not an absolute prohibition, authorisation is required before a non-native (such as the company) can deal with native lands.

The plaintiffs had entered into loan agreement cum assignment documentation with all 29 successful applicants/purchasers including the purchasers of the seven (7) affected landed properties. The following are the seven purchasers and the dates when their agreements were executed by Pegalan Development Sdn. Bhd.

Names	Exhibits		Dates
David Anandan	MMA5	..	20 August 1980
Vincent Anandan	MMA6	..	26 October 1981
Lorin bin Malim	MMA7	..	26 November 1981
Tai Soo Kian (together with: Chin Yee Lan Chin Yee Lin and Chin Yee Hen)	MMA8	..	15 March 1982
Auk Joo Tee	MMA9	..	11 September 1980
Liew Shin Hien @ Elizabeth Liew and Liew Kuat Kiong (together with	MMA10	..	29 December 1981
Liew Ket Min)	MMA11	..	26 September 1980

It is also important to note that the approval for conversion of the 2 native titles to country leases was only obtained from the Government Authority on 25 March 1981 and that the conversion premium was only paid by the company to the Government on 3 November 1982 and that the eventual country lease titles were finally issued on 17 November 1983. It is relevant to consider here as to when actually the native title lost its native status, whether at the date of approval of conversion, date when conversion premium was paid or when finally the country lease titles were issued. I have considered the case of *Foh Say Lee v. Ooi Heng Wah* [1969] 1 MLJ 47. Was there an attempt to deal with native land contrary to the Land Ordinance? I was impressed with defendants' submission that the company's agreement was a sale agreement and not an agreement to sell but this was to cut a word with a scimitar.

This Court has to abide by laws and to ensure that persons do not circumvent or act contrary to them. If the sale and purchase agreements signed before the approval of the conversion of the 2 (two) native titles can be declared as "legal" then (i) what could have happened to them if the conversion did not come through?; (ii) this may lead to other companies throwing laws to the winds and disregarding Acts of Parliament (or the State Legislature in our case). On this score, I had considered ruling that the sale and purchase agreements signed prior to 25 March 1981 (marked as MMA5, MMA9 and MMA11 all signed in 1980) are void and of no effect but upon reading Clause 12 of the sale and purchase agreement, I can accept that they were made with a view of sale after the issue of subdivisional title. Hence, they are not, as defendants claim, contrary to the provisions of the Ordinance. As in *Sajan Singh v. Sardara Ali* [1960] 1 All ER 269, I can safely say "Let the estate lie where it falls."

Conclusion

It is worthy of note that finance institution and banks, who are backed by legal brains and qualified managers, do meet empty customers at times when they wish to enforce what they think are forms of security. The securities turn out to be worthless. *Halsbury's Laws of England*, 4th Edn., Vol. 9, at pp. 433 and 434 and *Chitty on Contracts* (25th Edn.), Vol. 1, para. 1169, at p. 633 should be helpful.

As the law stands, "where the purchase money had been paid and the purchaser has received the instrument of transfer and the title deeds from the vendor but omits to complete registration" (see *Ong Chat Pang & Anor. v. Valliappa Chettiar's*), the purchaser with beneficial interest is protected. The words had been quoted from a 90-year old case of *Crowly v. Bergtheil* [1899] AC 374:

> even if the vendor fails to surrender the issue document of title and the duly completed transfer documents, with the understanding that these documents will be surrendered at a later date, the vendor still becomes a bare trustee.

Sale and Purchase of Real Property in Malaysia by Visu Sinnadurai at p. 218.

The Courts are inclined to observe the principles of equity in the protection of the little individual, that is, the purchaser, as against the big institutions or financiers, which are perceived as being able to withstand the loss, if any. The financiers may have lent, millions of ringgit on lands which have been fragmented and sold to individual purchasers prior to the charge on the land having been registered (see *UMBC v. Goh Tuan Laye & Ors.* [1976] 1 MLJ 169).

> accordingly, it may be appropriate that English equitable principles relating to land tenure, such as the concept of a bare trust, be resorted to as regards the tenure and incidents of the various kinds of dealings in land in respect of the period prior to registration.

Land Law in Malaysia Cases and Commentary by Teo Keang Sood and Khaw Lake Tee at p. 170.

Although I had mentioned six issues, I decided to deal with two which were contested by the defendants in their submissions. To recap, my ruling in:

(a) Issue (1):

> Whether the declared trust relationship between the registered owner and the company is in breach of s. 17(1) of the Sabah Land Ordinance and therefore void and unenforceable for the illegality.

is that the trust relationship does not breach the Sabah Land Ordinance and is therefore not void.

(b) Issue (2):

> Whether the sale & purchase agreements entered between the company and the purchasers are tainted with illegality being in breach of s. 17(1) of the Sabah Land Ordinance.

is that the sale and purchase agreements are not tainted with illegality.

My decision here is one which is in tandem with the various Supreme Court decisions (as elaborated earlier).

I therefore grant the order-in-terms of the applications by plaintiffs dated (i) 29 December 1988 (OS 150 of 1988); (ii) 5 January 1989 (OS 151 of 1988); and (iii) 29 December 1988 (OS 152 of 1988).

Also found at [1991] 2 CLJ 1497